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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1-2388~~ 176

JENKINS BROS.,
Petitioner,

v.

LOCAL 5623, UNITED STEELWORKERS OF AMERICA, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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—and—

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United States Const., Amend. X 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

JENKINS BROS.,
Petitioner,
v.
LOCAL 5623, UNITED STEELWORKERS OF AMERICA, *et al.*,
Respondents.

No. ....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Jenkins Bros., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on February 26, 1965.

Citations to Opinions Below

The opinion, and order of the District Court for the District of Connecticut, (Hon. William H. Timbers, U. S. D. J.) is printed in Appendix A hereto, infra, p. 1a, and is reported at 230 F. Supp. 871.

The opinion of the Court of Appeals is printed in Appendix B hereto, infra, p. 5a, and is unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on February 26, 1965, Appendix C, infra, p. 7a. The juris-

diction of this Court is invoked under 28 U. S. C., Section 1254(1).

Question Presented

Where under state law any person in control of premises who knowingly permits the premises to be used for pool-selling and policy-playing is liable to criminal prosecution; and where an employee is arrested in the employer's plant for pool-selling and policy-playing in the plant, and pleads guilty to the charges; and where the employer discharges the employee forthwith; and where under the declared public policy of the State any arbitration award directing reinstatement of the employee would be void; should the employer be forced to participate in an arbitration proceeding wherein the employee's union demands his reinstatement? That is, in fashioning a federal labor law, may the courts overrule the announced public policy of a state?

STATUTES INVOLVED

United States Const., amend. X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Section 301(a) of the Labor Management Relations Act, 61 Stat. 156 (1947), 29 U. S. C. § 185(a) (1958), provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as de-

fined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Conn. Gen. Stats., (Rev. 1961) Section 53-295

"*Pool selling.* Any person, whether as principal, agent or servant, who owns, possesses, keeps, manages, maintains or occupies, or assists in keeping, managing, maintaining or occupying, any building, room, office, park, ground, enclosure or place with apparatus, books or boards or any device for the purpose of making, recording or registering bets or wagers, or of buying or selling pools upon the result of any trial or contest of skill, speed or endurance of man, beast, bird or machine, or upon the result of any game, competition, political nomination, appointment or election, whether such trial, contest, game, competition, nomination, appointment or election takes place either within or without this state, or where pool selling of any kind, either directly or indirectly, is permitted or carried on, or in which the business of transmitting money to any race track or other place there to be placed or bet on any horse race, game, sport, competition, nomination, appointment or election, whether within or without this state, is permitted or carried on in any manner, and any person who keeps a place which is reputed to be a place resorted to for the purpose of selling pools upon the result of any election, and any person who makes, records or registers any such wagers or bets, or buys or sells, or is concerned in buying or selling, any such pools, or

in carrying on the business of the transmission of money to any race track or other place there to be bet or placed on any horse race, game, sport, competition, nomination, appointment or election, whether within or without this state, *and any person who, being the owner, lessee or occupant of any building, room, park, ground, enclosure or place, or part thereof, knowingly permits the same to be used or occupied for any such purpose, on the first conviction shall be fined not more than five hundred dollars or be imprisoned not more than one year or be both fined and imprisoned . . .*" (emphasis supplied).

Conn. Gen. Stats., (Rev. 1961) Section 53-298

"*Policy playing; gaming by use of lottery slips* or *tickets.* Any person, whether a principal, agent or servant, who owns, possesses, keeps, manages or maintains, or assists in keeping, managing or maintaining, any policy-office or place where the game of chance, business, scheme or occupation, commonly known as policy, is, or is reputed to be, played or carried on, or any place where bets or wagers are, or are reputed to be, made upon the result of a drawing in any lottery, or of the drawing of any numbers by chance, or any place which is, or is reputed to be, resorted to for any such purposes in whole or in part, or writes, sells, bargains, exchanges, gives, transfers, delivers, buys, collects or receives, or is concerned in writing, selling, bargaining, exchanging, giving, transferring, delivering or receiving, any policy slips, tickets, tokens, numbers or chances, used in said game of chance, business, scheme or occupation, or in wagering or betting

upon the result of any drawing in any lottery, or in any drawing of any numbers by chance, or collects or receives, or is concerned in receiving or collecting, any money or other valuable thing for any such slips, tokens, numbers or chances, or plays or takes part in any way in such game of chance, business, scheme, occupation, betting or wagering, in or out of any such office or place, or frequents any place or office . . . which is, or is reputed to be, resorted to for any of such purposes in whole or in part, or makes, manufactures or keeps, or is the custodian of, any slips, tokens, papers, books, records or registers of bets or wagers, or any appliances or apparatus used for any such purposes, *and any owner, mortgagee in possession, lessee or occupant of any building, room, structure or place, or part thereof, who knowingly permits the same to be used or occupied for any of the purposes mentioned in this section, for a first offense, shall be fined not more than one hundred dollars or imprisoned not more than six months or both . . .*" (emphasis supplied)

Statement

Plaintiff is a New Jersey corporation doing business in the building which it owns at Bridgeport, Connecticut. Defendant union is an unincorporated labor organization located at Bridgeport. The plaintiff company and defendant union are parties to a collective bargaining agreement. In pertinent part the agreement provides for the arbitration of certain disputes arising thereunder between the parties. The Connecticut State Board of Mediation and Arbitration is a quasi-administrative body of the State of Connecticut located at Wethersfield, Connecticut. It is the arbitrator named in the collective bargaining agreement.

On October 7, 1963, Edward Saladak was an employee of the plaintiff, and a member of defendant union. On that day police officers entered plaintiff's plant and placed Saladak under surveillance. They then searched his person and his workbench. They found in his possession and control numerous policy slips and horse plays. He was arrested in the plaintiff's plant for violations of the Connecticut gambling laws, specifically Sections 53-295 and 53-298 of the Connecticut General Statutes.

Immediately after the arrest, plaintiff discharged Saladak. The discharge was necessitated by the provisions of the two criminal statutes that make it a crime for the person in control of premises knowingly to permit pool selling and policy play to be carried on the premises.

The defendant union filed grievance with the company on October 8, 1963, alleging that the discharge of Saladak was "unjust".

On October 17, 1963, Saladak pleaded guilty in the Connecticut Circuit Court for the Second Circuit to violations of Sections 53-295 and 53-298.

On December 12, 1963, the company received a letter from the Secretary of the Connecticut State Board of Mediation and Arbitration, notifying the company that the union had requested the board to arbitrate the discharge. The board thereafter scheduled an arbitration hearing for March 6, 1964.

However, under the declared public policy of Connecticut, any arbitration award directing reinstatement of an employee guilty of violating these gambling laws on the employer's premises would be void as contrary to public policy, even where the submission was unrestricted. *Avco Corporation* v. *Preteska,* 22 Conn. Supp. 475, 174 A. 2d 684 (Super. Ct. 1961).

Prior to the arbitration hearing, therefore, the plaintiff instituted an action in the Superior Court of the State of Connecticut for Fairfield County, at Bridgeport, against the union and the board to enjoin said defendants from proceeding with the arbitration hearing. Plaintiff's complaint was based on two grounds: (1) that the board should not proceed with such arbitration hearing since there was no agreement between union and plaintiff to arbitrate the discharge of Edward Saladak, and (2) that if the defendants were not enjoined from proceeding with the arbitration hearing, plaintiff would be forced to participate in an arbitration hearing held in contravention of the announced public policy of the State of Connecticut.

On March 2, 1964, as a result of a petition for removal filed by the union, plaintiff's action was removed to the United States District Court, District of Connecticut. Thereafter, both defendant union and defendant board filed motions to dismiss plaintiff's action. Plaintiff filed a motion to remand.

On April 24, 1964, the District Court (Honorable William H. Timbers U.S.D.J.) entered judgment granting defendant union's motion to dismiss and denying plaintiff's motion to remand (Appendix A). The motion to dismiss filed by defendant board was dismissed as moot, since the board had been dropped as a defendant as the result of a stipulation executed by the board and the plaintiff.

Plaintiff appealed the judgment.

The Court of Appeals for the Second Circuit affirmed the judgment below in a *per curiam* opinion (Appendix B) and entered judgment accordingly, on February 26, 1965 (Appendix C).

Reasons for Granting the Writ

1. The decision below conflicts in principle with decisions of this Court, the New York Court of Appeals, and the California Supreme Court.

In *Southern Steamship Co.* v. *NLRB,* 316 U. S. 31, this Court struck down a Labor Board order directing the reinstatement of seamen who went on strike on board ship in response to their emoplyer's unfair labor practices, because the strike also constituted mutiny within the meaning of the Criminal Code. The Court pointed out that "Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another . . ." Id., 47.

Earlier, in *NLRB* v. *Fansteel Corp.,* 306 U. S. 240, a Labor Board order for the reinstatement of unfair labor practice strikers was denied enforcement because the strikers had engaged in "unlawful conduct", a sit-down that constituted an illegal seizure of their employer's plant.

The highest courts of two states also have refused to enforce arbitration awards that ran counter to public policy. *Matter of Western Union Telegraph Co.,* 299 N. Y. 177, 86 N. E. 2d 162; *Black* v. *Cutter Laboratories,* 43 Cal. 2d 788, 278 P. 2d 905. The *Western Union* case involved employees who had illegally refused to handle telegraph messages from or to other companies at which a strike was in progress. The *Cutter Laboratories* case involved an employee discharged for Communist Party membership and activity that the California Supreme Court found was condemned by state public policy. This court dismissed certiorari, 351 U. S. 292.

The cases cited above proceeded upon the principle that legal process should not be used to compel or condone conduct that is criminal, illegal or that is contrary to public policy.

"Of course there *is* a public policy which condemns gambling by an employee on the premises of his employer; . . . ." *Local 453* v. *Otis Elevator Co.,* 314 F. 2d 25, 29 (2 Cir. 1963) (emphasis supplied)

Nevertheless, the decision below discounts what it calls "theories of state public policy or police power" in favor of "the clearly enunciated federal policy of enforcing arbitration provisions in union management contracts . . ." The decision below would compel the employer to enter into an arbitration which might well result in the reemployment of the employee discharged for criminal activity on the company premises. The court below seeks to justify this shocking result on the ground that "the question whether an award would be enforceable is one of federal law", without recognizing that "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and *applicable legal precedents*." *Hurd* v. *Hodge* 334 U. S. 24, 34. (emphasis supplied).

Here the "applicable legal precedent" which manifests the relevant public policy is *Avco Corporation* v. *Preteska, supra.* That case holds at p. 481 of 22 Conn. Supp. that in Connecticut, arbitration awards which compel the reinstatement of an employee guilty of gambling on the employer's premises are *void* as against the public policy of Connecticut.

This is because where public policy, as embodied in a statute, forbids the performance which is the subject of dispute, that policy and statute are as binding on arbitrators as on courts, *Exercycle Corp.* v. *Maratta,* 9 N. Y. 2d 329 at p. 335, 214 N. Y. S. 2d 353 at pp. 356-7.

2. The question presented is clearly important in the developing field of federal labor law. Perhaps the largest single category of labor arbitration cases is that involving issues of discharge and discipline. Whether, under the

usual form of arbitration agreement, the employer is obligated to arbitrate as a "labor dispute" an admitted violation of state criminal law in the plant, is therefore a practical and continuing problem. Not infrequently, the reason for discipline or discharge is illegal or criminal conduct on the part of the employee affected.[1] Recent arbitration awards indicate that in-plant gambling is not an uncommon form of such conduct.[2]

The question raised by the decision below is therefore likely to arise with some frequency in the future, and the way in which it is decided will undoubtedly affect the functioning of the labor arbitration system so strongly endorsed by this Court in the *Steelworkers* cases.

It is in the public interest to have that arbitration system function well, and in accommodation with the statutory schemes of law and order which lie at the foundations of society. Therefore it is in the public interest to have the important issues raised by the decision below authoritatively settled by this Court.

The rule that an employer must proceed to arbitration of any grievance is not absolute, *John Wiley & Sons* v. *David Livingston,* U. S. , 84 S. Ct. 909, 32 L. W. 4285. Certainly, an exception to the rule should be made when, as here, an employee is committing criminal acts on the company premises and is thereby exposing the employer himself to arrest and prosecution. "The strategy of discipline is not simple," *Southern Steamship* v. *NLRB,* 316 U. S. 31, 46. Plant discipline would be a mockery

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[1] E.g., *Mansfield Tire & Rubber Co.,* 31 L. A. 775; *Penn-Dixie Cement Corp.,* 29 L. A. 451; *Glasgow-Adrian Co.,* 25 L. A. 614; *Certain-Teed Products Corp.,* 24 L. A. 606; *Republic Steel Corp.,* 23 L. A. 808; *Sherwin-Williams Co.,* 22 L. A. 1; *Quaker Oats Co.,* 15 L. A. 42.

[2] *Lockheed Aircraft Corp.,* 37 L. A. 188; *Haskell Mfg. Co.,* 33 L. A. 174; *Publishers' Association of New York City,* 32 L. A. 44; *Advertiser Publishing Co.,* 32 L. A. 26; *Sun Drug Co.,* 31 L. A. 191.

if the employee were entitled to arbitrate his discharge under such circumstances.

3. The Court of Appeals has decided a federal question in a way in conflict with an analogous decision of this Court. This Court has recognized that an employee's violation of a state's criminal syndicalism statutes by Communist Party membership justifies the discharge of the employee under a "just cause" provision of the contract, so that an arbitration award directing reinstatement, which the state court declares contrary to state public policy, is unenforceable. *Black* v. *Cutter Laboratories,* 43 Cal. 2d 788, 278 P. 2d 905, cert. dismissed 351 U. S. 292 (1955). This Court there held that a state's construction of a local contract under local law is entitled to be honored, so that the contract could not be enforced to protect criminal activities "whether in the guise of unionism or otherwise" (p. 299).

We contend that the instant case also allows room for the play of state law and policy, even in the context of a federal labor law. This is so because "state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy", *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448, 457.

In the process, of course, the state law applied will become part of the fabric of federal law. Id. Thus, "the historic acceptance of concurrent state and federal jurisdiction of cases arising under federal law", *Chas. Dowd Box Co.* v. *Courtney,* 368 U. S. 502, 514, is given full play.

Here, the state's public policy is not a matter of conjecture, as it was to some degree in *Otis Elevator* v. *Local 453,* 314 F. 2d 25, cert. den. 373 U. S. 949. Connecticut's public policy is set forth explicitly in *Avco Corporation* v. *Preteska, supra.* There the Connecticut court declared that an arbitration award compelling reinstatement of an em-

ployee who had gambled on the employer's premises, is *void* as contrary to public policy.

The judicial inquiry herein must be strictly confined, under § 301 and the rule of *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582, to one question: whether the company ever agreed or is obligated to arbitrate a grievance which might result in an order that it "must furnish both premises and opportunity to such employees to carry on gambling activities . . ." (*Avco Corporation* v. *Preteska*, 22 Conn. Supp. at 480).

To ask the question is to answer it.

4. This case presents a basic Constitutional question: Even in fashioning a federal labor law, may the courts disregard the announced public policy of a state?

True, the enforcement of arbitration provisions in collective bargaining agreements is now a matter of federal law, *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, 457. However, state courts have concurrent jurisdiction in such cases, *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502, although they too must apply federal law, *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95.

Whatever court assumes jurisdiction must use due discretion in pursuing the objectives of federal labor law. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another. *Southern Steamship Co.* v. *NLRB*, 316 U. S. 31, 47. Here, there was a state statutory scheme to prohibit pool selling and policy play, and to impose criminal sanctions on an occupier of property who knowingly permits such illegal activities in his plant.

We contend that the employer had certain "normal rights of redress" in this situation, which "in their most obvious scope, included the right to discharge the [wrong-

doer] from its employ", *NLRB* v. *Fansteel,* 306 U. S. 240, 254. In truth, the employer had only one possible course: to protect itself from possible prosecution and conviction under state law, to wit, by discharging the guilty employee.

It is not too much to demand of a federal court, seeking to fashion a federal labor law, that it undertake accommodation to the state criminal statutes without excessive emphasis upon its immediate task of fashioning the federal law. Cf. *Southern Steamship Co.* v. *NLRB,* supra, at p. 47. To require arbitration looking to the reinstatement of a confessed gambler in the employer's plant would subvert the "principles of law and order" which, this Court has pointed out, *NLRB* v. *Fansteel,* 306 U. S. 240, 253, "lie at the foundations of society."

A federal court fashioning a federal labor law must give due deference to such an important state policy, and not judicially erode the basic state right to preserve law and order, in contravention of the Tenth Amendment.

In a leading case in the area of labor relations, *Allen-Bradley Local 1111* v. *Wisconsin Employment Relations Board,* 315 U. S. 740, 749 the Court declared:

> ". . . [T]his Court has long insisted that an 'intention of Congress to exclude States from exerting their police power must be clearly manifested' . . ."

Surely the federal labor policy, which favors arbitration as the preferred method for settling labor disputes was not intended by Congress—and to date has not been so interpreted by this Court—to extend so far as to encroach upon a State's right to enact and administer its criminal laws under the proper exercise of its police power, guaranteed to the states by the Tenth Amendment.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: May 20, 1956

Respectfully submitted,

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—and—

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APPENDIX A

Memorandum Order of the District Court for the District of Connecticut granting defendant union's motion to dismiss

MEMORANDUM ORDER ON

(1) PLAINTIFF'S MOTION TO REMAND;

(2) DEFENDANT UNION'S MOTION TO DISMISS OR FOR STAY; AND

(3) DEFENDANT'S BOARD'S MOTION TO DISMISS

Plaintiff having moved, pursuant to 28 U.S.C. § 1447, to remand this action to the Superior Court for Fairfield County, from which it was removed to this Court, pursuant to 28 U.S.C. § 1441, by defendant Local 5623, United Steelworkers of America (defendant Union); and

Defendant Union having moved, pursuant to Rule 12 (b)(6), Fed. R. Civ. P., to dismiss the action for failure to state a claim upon which relief can be granted, or, in the alternative, for a stay of proceedings in this action pending arbitration of the dispute in accordance with the collective bargaining agreement between plaintiff and defendant Union; and

Defendant The Connecticut State Board of Mediation and Arbitration (defendant Board) having moved, pursuant to Rule 12(b)(2), Fed, R. Civ. P, to dismiss the action for lack of jurisdiction over defendant Board; and

Plaintiff and defendant Board having stipulated that defendant Board be dropped as a defendant herein; and

The Court having heard argument by counsel for the respective parties; having considered their pleadings, motions, affidavits and briefs; and being of the opinion that

(A) Plaintiff's motion to remand the action should be denied for the reasons

(1) that, whether the complaint be construed as seeking an injunction to enjoin arbitration of a matter not arbitrable under the collective bargaining agreement or a declaratory judgment requesting protection against improper demands for arbitration, under controlling law the action is one over which this Court would have had original jurisdiction to determine the obligation of the parties to arbitrate a dispute under a collective bargaining agreement in an industry affecting commerce, pursuant to Section 301(a) of the Labor Management Relations Act, 29 U. S. C. § 185(a) (*Black-Clawson Co., Inc.* v. *International Association of Machinists,* 313 F. 2d 179, 181-2 (2 Cir. 1962); *Armstrong-Norwalk Rubber Corp.* v. *Local 283,* 167 F. Supp. 817, 818 (D. Conn. 1958); *cf. Local 453* v. *Otis Elevator Co.,* 314 F. 2d 25 (2 Cir.), *cert. denied,* 373 U. S. 949 (1963));

(2) that, since this is a civil action over which this Court would have had original jurisdiction (28 U. S. C. § 1331(a); 29 U. S. C. § 185(a)), the action therefore was properly removed to this Court (28 U. S. C. § 1441(a) and (b)); and

(B) Defendant Union's motion to dismiss the action should be granted for the reasons

(1) that an arbitration board, pursuant to a collective bargaining agreement, may arbitrate the question of just cause in the discharge of

an employee for violation of state gambling laws notwithstanding the existence of a public policy of the state against gambling (*Local 453* v. *Otis Elevator, supra* at 28-29, *reversing* 206 F. Supp. 853 (S. D. N. Y. 1962));

(2) that, assuming without holding that there is a public policy of the State of Connecticut which condemns gambling by an employee on the premises of his employer (*Avco Corporation* v. *Preteska,* 22 Conn. Supp. 475, 174 A. 2d 684 (Super. Ct. 1961)), such state public policy is not controlling over, but must yield to, the substantive principles of national labor law which the federal courts are empowered to fashion—in short, the public policy of the United States as declared by the federal courts in the field of national labor law must prevail over any state public policy asserted to the contrary (*Local 453* v. *Otis Elevator Co., supra* at 28-29; *cf. John Wiley & Sons, Inc.* v. *David Livingston,* 32 U. S. L. Week 4285, 4286 (U. S. March 30, 1964)); and

(C) Defendant Board's motion to dismiss the action should be denied as moot for the reason that said defendant by stipulation has been dropped as a defendant herein; it is

ORDERED that plaintiff's motion to remand the action be, and the same hereby is, denied; and it is further

Appendix A

ORDERED that defendant Union's motion to dismiss the action be, and the same hereby is, granted; and it is further

ORDERED that defendant Board's motion to dismiss the action be, and the same hereby is, denied as moot.

Dated at New Haven, Connecticut, this 24th day of April, 1964.

WILLIAM H. TIMBERS
William H. Timbers
United States District Judge

APPENDIX B

Opinion of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 254—September Term, 1964.

(Argued January 22, 1965 Decided February 26, 1965.)

Docket No. 29027

JENKINS BROS.,

Plaintiff-Appellant,

—v.—

LOCAL 5623, UNITED STEELWORKERS OF AMERICA, *et al.*,

Defendant-Appellee.

Before:

MOORE, FRIENDLY and MARSHALL,

Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Connecticut, William H. Timbers, *Judge*, dismissing an action to enjoin arbitration of a grievance. Affirmed.

CLIFFORD R. OVIATT, JR., Stamford, Conn. (Morgan P. Ames, Stamford, Conn., on the brief) (John A. Sabanosh, Cummings & Lockwood, of counsel), *for Plaintiff-Appellant.*

DANIEL BAKER, Stamford, Conn. (Baker and Diamond, on the brief), *for Defendant-Appellee.*

Appendix B

PER CURIAM:

This appeal is another attempt to escape the clearly enunciated federal policy of enforcing arbitration provisions in union management contracts by seeking to interpose theories of state public policy or police power. Appellant, Jenkins Bros., sued the appellee union in the Superior Court of the State of Connecticut for Fairfield County seeking injunctive relief against the holding of an arbitration hearing on a grievance involving the discharge of an employee who had been convicted of violating the gambling laws of Connecticut. The proceeding was removed to the United States District Court of Connecticut where appellee union filed a motion to dismiss and appellant filed a motion to remand. The motion to remand was denied and appellee's motion to dismiss was granted.

Judge Timbers dismissed the action on the authority of our decision in *Local 453* v. *Otis Elevator Co.*, 314 F. 2d 25 (2 Cir.), *cert. denied*, 373 U. S. 949 (1963). Appellant seeks to distinguish *Otis* by relying upon a lower Connecticut court decision that an arbitration award would be contrary to Connecticut public policy. *Avco Corp.* v. *Preteska*, 22 Conn. Super. 475, 174 A. 2d 684 (1961). This argument completely ignores our holding in *Otis* that the question whether an award would be enforceable is one of federal law. *Textile Workers Union of America* v. *Lincoln Mills*, 353 U. S. 448 (1957).

We therefore affirm the judgment below.

APPENDIX C

Judgment of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of February, one thousand nine hundred and sixty-five.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. THURGOOD MARSHALL,
Circuit Judges.

JENKINS BROS.,
Plaintiff-Appellant,

v.

LOCAL 5623, UNITED STEELWORKERS OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the District of Connecticut.

Appendix C

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 23 1965
JOHN F. DAVIS, CLERK

No. 176

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

JENKINS BROS., *Petitioner*

v.

LOCAL 5623, UNITED STEELWORKERS OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 176

JENKINS BROS., *Petitioner*

v.

LOCAL 5623, UNITED STEELWORKERS OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

The Company (petitioner) and the Union (respondent) are parties to a collective bargaining agreement which provides that the Company may discharge employees only for just cause, and that the Union may arbitrate claims that the Company has violated the agreement.

The Company discharged an employee, Edward Saladak, on the stated ground that he had gambled on Company premises. The Union invoked arbitration of the question: "Was the discharge of Edward Saladak for just cause; if not, what shall the remedy be?" The Company instituted the present action in state court to restrain the Union and

The Connecticut State Board of Mediation and Arbitration (the arbitrator designated in the agreement) from arbitrating the dispute. The complaint acknowledged that the dispute was arbitrable under the agreement (R. 3a),[1] but asserted that the agreement was "unenforceable" (R. 6a) because:

> "An arbitration award directing the reinstatement of an employee discharged by an employer for violation on Company premises of the state gambling statutes is void and unenforceable as against the public policy of the State of Connecticut." (R. 5a).

The Union removed the action to federal district court on the ground that the complaint was one arising under Section 301 of the Labor-Management Relations Act, 29 U. S. C. § 185 (R. 1a). The Union thereafter moved to dismiss the complaint for failure to state a claim (R. 13a).

The district court dismissed the complaint. It held that the dispute was arbitrable under the agreement, and that, "assuming without holding" that an award reinstating an employee for gambling on Company premises would violate Connecticut's public policy, "such state public policy is not controlling over, but must yield to, the substantive principles of national labor law" requiring arbitration of grievance disputes where the parties have agreed thereto (R. 17a-18a).

The Court of Appeals for the Second Circuit affirmed, in a *per curiam* opinion, on the authority of its decision in *Local 453, International Union of Electrical Workers* v. *Otis Elevator Company*, 314 F. 2d 25 (1963).

The Court of Appeals' judgment was entered on February 26, 1965. The Company did not move to stay the mandate, and the mandate issued on March 23, 1965.

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[1] Record references are to the Appendix to Appellant's brief in the court below, which constituted the record in the court below.

The State Board of Arbitration scheduled the arbitration to be heard on April 9, 1965. The Company's attorney appeared at the outset of the hearing to urge that the case not be heard, because "an arbitration hearing would make its case moot before the Supreme Court" (Appendix, p. 3).[2] The State Board decided to proceed, and the Company attorney refused to participate and left. The Board conducted the hearing in the absence of the Company attorney because, as the Company recognized in its complaint, "If one of the parties to a dispute fails to appear before said Board, after due notice, the Board may execute its duties *ex parte*" (R. 4a).

On June 7, 1965 the Company applied to the Court of Appeals "for recall of mandate and stay of its reissuance," stating that the State Board's award might be forthcoming at any time unless the mandate were recalled. On June 16, 1965 the Court of Appeals denied the Company's application.

On June 30, 1965, the State Board issued its arbitration award, reinstating Saladak, but without back pay for the 21 months during which he was denied employment. The award is set out in an appendix to this brief. The Board recited Saladak's testimony that he had had an excellent work record with the Company for 11 years; that "he had not taken 'play' in the plant but had carried slips into the plant representing 'play' taken at other times"; and that "he had not been involved in any kind of 'action' in the plant" (Appendix, p. 4). The Board found that to be arrested on Company property while in possession of policy slips, without having gambled on Company property, was not just cause for discharge, but warranted the imposition of the lesser discipline of denial of back pay.

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[2] "Appendix" refers to the appendix to this brief, consisting of the State Board's decision.

ARGUMENT

The petition for certiorari should be denied for several reasons:

(1) This action is now moot;

(2) The Company's "Question Presented" is *not* presented by the facts of this case; and

(3) The Company's "Question Presented" is not worthy of this Court's attention.

1. This action is now moot. It was brought to restrain the Union from "proceeding to arbitrate its dispute regarding the discharge of Edward Saladak" (R. 8a-9a). But the dispute has now been arbitrated, and the arbitration award rendered. There is nothing left to litigate.

2. The "Question Presented" is *not* presented by the facts of this case. According to the petition the "announced public policy" of the State of Connecticut precludes enforcement of an arbitration award reinstating an employee who has gambled *on Company premises*[3] (Petition for Certiorari, pp. 6, 8, 9, 11-12). The "Question Presented" (Petition, p. 2) is whether, in light of that "public policy," a federal court may order arbitration of the justness of discharge of an employee who gambled *"in the plant."* But this begs one of the questions which the Union wished to arbitrate: did Saladak gamble in the plant? Indeed, Saladak testified in the arbitration hearing that he did not, and the State Board of Arbitration concluded that "on the basis of the evidence presented in the hearing . . . there was not just cause for

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[3] The "announced public policy" on which the Company so heavily relies is an unappealed decision of a lower court. *Avco Corp.* v. *Preteska,* 22 Conn. Supp. 475, 174 A. 2d 684 (Super. Ct. Fairfield Co. 1961). The judge refused to enforce an award in which the arbitrator found that the employee *had* gambled on Company property but nonetheless ordered him reinstated. The language of the judge's opinion makes clear that the invoked "public policy" is applicable only if the arbitrator finds that the employee has gambled on Company property.

discharge" (Appendix, p. 5). An arbitration award reinstating Saladak because he did *not* gamble on Company premises does not conflict with any announced public policy of the State of Connecticut.[4] The decision of the court below, therefore, does not raise petitioner's "Question," for it does not "overrule the announced public policy of [the] state" (Petition, p. 2).

3. We have shown that petitioner's "Question" is not raised by the facts of this case. Even if it were, however, the "Question" would not be worthy of this Court's attention.

There is only one reported decision in which the "Question" has been considered, *Local 453, International Union of Electrical Workers* v. *Otis Elevator Co.*, 314 F. 2d 25 (2d Cir. 1963), *cert. denied* 373 U. S. 949 (1963). There, the arbitrator found that the employee *had* gambled on Company property but reduced the penalty from discharge to a seven-month suspension, reasoning "that Calise had already been punished once for his offense by the public authorities, that he had undergone a seven-month layoff without pay or unemployment compensation, that he had 24 years of unbroken seniority and satisfactory service at the Company, that he had 'heavy family obligations involving four young innocent children and a wife,' that as a result of discharge he would lose considerable pension rights 'built up after decades of service,' and that the company had not disciplined the four other men who 'were guilty also of violating the same rule against gambling in the plant.'" 314 F. 2d at 27.

The district court in *Otis* refused to enforce the award, on the ground that reinstatement of the employee would violate the "public policy" of the State of New York. 206 F. Supp. 853 (S. D. N. Y. 1962). The court of appeals re-

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[4] Moreover, arbitrators normally hold that gambling *outside* Company property does not constitute just cause for discharge. *Radio Corporation of America*, 39 L. A. 621 (1962); *General Electric Co.*, 41 L. A. 823 (1963).

versed. At the outset, it noted that the parties had bargained to have an arbitrator, not a court, decide whether the employee should be reinsated. 314 F. 2d at 28. Acknowledging that there might conceivably be some circumstances in which "public policy" would preclude enforcement of an arbitration award, it emphasized that this would be a *federal* "public policy," drawn from "the substantive principles of federal labor law which federal courts, under the mandate of Textile Workers Union of America v. Lincoln Mills, 353 U. S. 448 (1956), are empowered, to fashion." 314 F. 2d at 29. It determined that there is no federal policy precluding enforcement of an award reinstating an employee convicted of gambling on his employer's premises.

> "Of course there is a public policy which condemns gambling by an employee on the premises of his employer; it is a policy expressed by the section of the New York Penal Law which Calise was convicted of violating. But that policy has been vindicated in the present case in the very manner that the State of New York contemplated, by a criminal conviction and a judicial imposition of a penalty. . . . *There is no federal policy that requires greater vindication of the public condemnation of gambling than this.* The law is not that Draconian. To enforce the arbitrator's award in these circumstances cannot fairly be looked upon as judicial condonation of Calise's offense." (314 F. 2d at 29; emphasis supplied.)

The Company in *Otis* had argued—as did the Company here—that it would be subjected to criminal liability if forced to reinstate the employee, because state law forbids an owner of premises from "knowingly" permitting gambling on the premises. The court dismissed the contention out of hand:

> "It is hard to imagine that an employer who had specifically indicated his disapproval of gambling on

the premises, had penalized the employee found guilty, and had warned against any such conduct in the future could be found guilty of violating the statute." 314 F. 2d at 29.

The Company petitioned for certiorari from the Second Circuit's decision. Certiorari was denied. 373 U. S. 949 (1963).

The decision in *Otis* clearly is correct, and effectuates federal labor policy. There have been no subsequent decisions by any court, state or federal, on the question decided in *Otis*. The question was not worthy of review in 1963, as this Court concluded in *Otis*, and it is no worthier of review today.

4. The decision below (or, more precisely, the decision of the court below in *Otis*, which the Company treats as if it were the decision below) does not conflict, even "in principle", with the cases relied upon in the petition (pp. 7-8). None of those cases arose under Section 301 of the LMRA, and thus none involved the enforceability of arbitration awards under the "federal common law" of *Lincoln Mills* and subsequent decisions. Moreover, none of those cases involved employees whose vice was gambling. The court below recognized, in *Otis*, that there might be some awards which would be unenforceable because in conflict with federally fashioned "public policy" 314 F. 2d at 29. It held only that there is no such policy precluding enforcement of an award reinstating an employee guilty of in-plant gambling. The Company's cases dealt with entirely different types of employee misconduct[5] and thus are totally inapposite.

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[5] Mutiny aboard ship *(Southern Steamship)*; seizure of the employer's plant *(Fansteel)*; membership and participation in the Communist Party *(Cutter Laboratory)*; refusal to transmit telegraph messages *(Western Union)*.

CONCLUSION

This case is moot. The "Question Presented" is *not* presented by the facts of this case. If it were, it would not be worthy of this Court's attention. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

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STATE OF CONNECTICUT
LABOR DEPARTMENT

STATE BOARD OF MEDIATION AND ARBITRATION

JENKINS BROTHERS — and — LOCAL 5623 UNITED STEELWORKERS OF AMERICA	*Arbitration Award* Case No. 6364-A55 Dated: June 30, 1965

An arbitration hearing was held on this matter in Bridgeport, Connecticut, on April 9, 1965. Representing the Company was Clifford R. Oviatt, Jr., Attorney, and appearing for the Union was Warren Pyle, Attorney.

SPECIAL BACKGROUND

A grievance was processed in August 1964 protesting the discharge of Edward Saladak and it came to the arbitration step. Arbitration was requested by the Union. At that point it was decided that arbitration would be held up until the Company processed its claim in court that this matter was not a proper subject of arbitration.

In December 1964 the United States District Court dismissed the Company action to enjoin the Board from arbitrating the grievance in dispute. The Company then appealed to the United States Court of Appeals. On February 26, 1965, the Court dismissed the Company action.

In March, 1965 the Board received the following communication:

"Board of Mediation and Arbitration
State Labor Department
200 Folly Brook Boulevard
Wethersfield, Connecticut

"Attention: Robert A. Cronin
Board Secretary

Re: Jenkins Bros. and Local 5623, United Steelworkers of America

Board Case No. 6364 A-55

"Gentlemen:

"In your letter of March 22, 1965, you asked our advice as to whether the Board should assign the arbitration hearing in view of the decision in the above case of the United States Court of Appeals for the Second Circuit, Docket No. 29027, dismissing the employer's appeal.

"It is our opinion that the Board should now assign the matter for arbitration hearing as requested by the Union. Furthermore, we feel that the same procedures should be followed in the companion case—Jenkins Brothers and Local 123, O.E.I.U., Board Case No. 6364-A47.

"The ruling does in our opinion also govern the case involving Local 123, O.E.I.U.

"Very truly yours,

Harold M. Mulvey
Attorney General

By Raymond J. Cannon (Signed)
Raymond J. Cannon
Assistant Attorney General

"RJC:D
cc: Robert L. Stutz
Board Chairman"

The Board then set an arbitration hearing for April 9, 1965, at Bridgeport, Connecticut. The Company and Union presented themselves. The Company declined to participate in an arbitration hearing, claiming that it was planning an appeal to the United States Supreme Court and asked that arbitration not go forward until the Company's legal remedies were exhausted. The Company stated that an arbitration hearing would make its case moot before the Supreme Court. The Company also stated that the Attorney General of Connecticut had agreed that arbitration would not take place until litigation was completed.

The Board then caucused and decided that it would proceed immediately with an arbitration hearing. The Company declined to participate. As the Company left the hearing room, it instructed two police officers subpoenaed by it to stay at the hearing.

The Board then proceeded with an ex parte hearing and the Union requested that there be a decision in favor of the Union on the basis of a default by the Company.

The Board stated that the Union should put on its entire argument and the hearing continued.

Issue

The Board has set down the following issue for arbitration:

> Was the discharge of Edward Saladak for just cause? If not, what should the remedy be?

It is based upon the Union grievance as presented to the Company.

PERTINENT CONTRACT PROVISIONS

Article II, Management

A. Subject to the conditions of this agreement, the Union recognizes the retention by the Company of the usual management rights, including the management

of the work and the direction of the work force, the right to hire, suspend or discharge for just cause or to transfer; the right to relieve employees because of lack of work or for other legitimate reasons, and the right to determine the extent to which the plant shall be operated, including the determination of shift hours and the right to change methods or processes or to use new equipment.

Facts

On October 7, 1963, under sections of the Connecticut General Statutes, a number of policemen arrested Mr. Edward Saladak in the plant. The Company discharged Mr. Saladak.

On October 17, 1963, Mr. Saladak appeared with counsel before the Second Circuit Court (Bridgeport, Connecticut) and pleaded guilty to a charge of violation of Section 53-298 of the General Statutes entitled Policy Playing and Section 53-295 entitled Pool Selling. The record before the Court was introduced in evidence by the Union. It was testified that this was a first offense. The Court accepted the plea and fined Mr. Saladak $50.00 for policy playing and $100.00 for pool selling.

Argument

Mr. Saladak appeared as a Union witness and testified that he had worked for the Company for twelve years. His work record was excellent, he reported, with one warning in 1953 for taking an unauthorized day off.

In answer to a question from the Board, Mr. Saladak testified that he had not taken "play" in the plant but had carried slips into the plant representing "play" taken at other times. He stated further that he had not been involved in any kind of "action" in the plant.

The Union argued that Mr. Saladak has been punished by the Court and that the Company's discharge action was unjustified under all the circumstances.

The Union contended that the Avco case (Avco Corporation vs. Preteska, 174 Atlantic 2nd 684, 1961) did not apply since that case was involved with gambling activity on the Company premises during working hours. The Union pointed out that the Avco case had been rejected by the two Federal courts that heard the Saladak case.

Discussion

The Board noted the position of the Company with respect to its intended appeal to the Supreme Court and decided to go forward on the basis of the statement of the Attorney General (supra).

The Board noted the Union's position that there had been a default by the Company but decided that the Union must go forward and put on its total case for a decision by the Board.

The Board asked the two witnesses subpoenaed by the Company if they had statements to make. They did not offer a statement.

The initial question to be answered is as follows:

> Was there just cause for discharge in the arrest on the Company premises for violation of the law against policy playing and pool selling?

On the basis of the evidence presented in the hearing, the Board finds that there was not just cause for discharge.

This answer leads to the following question:

> It being determined that there was not just cause for discharge of Mr. Saladak, should there be a total remedy in favor of Mr. Saladak on the basis of an arrest on Company premises for policy playing and pool selling?

The arrest on Company premises for an illegal act on the Company premises compels the Board not to provide a total remedy to Mr. Saladak.

AWARD

1. The discharge of Edward Saladak was not for just cause. The Board, therefore, orders the Company to reinstate Edward Saladak to his job on the Monday following receipt of this award.

THE CONNECTICUT STATE BOARD OF MEDIATION AND ARBITRATION

George Bennett (Signed)

George F. McDonough (Signed) (Dissenting)

Vincent J. Sirabella (Signed)

2. There will be no back pay awarded to Edward Saladak for the period from October 7, 1963 to the Monday following receipt by the Company of this award.

George Bennett (Signed)

George F. McDonough (Signed)

Vincent J. Sirabella (Signed) (Dissenting Opinion)

STATE OF CONNECTICUT
LABOR DEPARTMENT

STATE BOARD OF MEDIATION AND ARBITRATION

JENKINS BROTHERS — and — LOCAL 5623 UNITED STEELWORKERS OF AMERICA	*Dissenting Opinion* Case No. 6364-A55 Dated: June 30, 1965

I disagree with the Board's majority opinion, failing to award Edward Saladak back pay, for the following reasons:

1. The issue as framed was "Was the discharge of Edward Saladak for just cause?" Yet, in the discussion, this is translated into the following issue, "Was there just cause for discharge in the arrest on the Company premises for violation of the law against policy playing and pool selling?" I submit that this distorts the issue presented completely. It ignores entirely the fact that he was discharged for violation of the Company rule against wagering on the Company premises and that whether this rule was violated is the issue, not whether a state law or any other rule was violated. The facts failed to show any such violation. He was actually discharged on the basis of the arrest and not on the conviction.

2. The next issue as determined by the Board is "What shall the remedy be?" But again in the discussion it is translated to read "Should there be a total remedy in favor of Saladak on the basis of an arrest on Company premises for policy playing and pool selling?"

Since at the time of the discharge Saladak was only arrested for the violation of two statutes—and not for the specific crimes of policy playing or pool selling—the Company acted prematurely in rushing the discharge. It had not evidence of its own to indicate anything more than "possession" at that time. It had no evidence that there had been wagering by the employee on the Company premises. There was, therefore, no basis whatsoever for imposing any penalty then. It failed to offer any case here, and it, therefore, should be required to reinstate the employee with full rights of employment less any monies earned from employment since his discharge.

3. In this case, the matter was not heard for some *18 months* after the discharge. The entire delay was due solely to the employer's efforts in the Courts to *prevent arbitration.* The union made every effort to get a hearing, but the Board did not proceed until advised to do so by the Attorney General. The result of this delay—the employee lost an average of $130 per week or about $10,000, without regard to the Company insurance and pension plans and overtime. Hence, Saladak is being penalized to an extent that he is paying the legal costs involved in *preventing* arbitration. Moreover, while the Court's penalty for violation of the General Statutes was $150, the Board's denial of back pay in effect "fines" Saladak a sum many times greater than the Court did.

4. The Board's concern with the question of what an employer ought to do about an employee violating a state law on his premises was, in my opinion, answered by the Second Circuit Court in Otis Elevator vs. Local 453, IUE, where the Court pointed out that the individual has paid his debt to the community by way of a fine and that further punishment for such crime should not be imposed by the employer. The

answer is that this is society's obligation, not the individual employer's, and that once society has acted, the employer cannot superimpose an additional penalty for the violation of the law itself. This is particularly true here where the Company never had any evidence of "wagering on the Company premises."

Vincent J. Sirabella (Signed)

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JENKINS BROS.,

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v.

LOCAL 5623, UNITED STEELWORKERS OF AMERICA, ET AL.,

Respondents.

PETITIONER'S REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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JENKINS BROS.,
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LOCAL 5623, UNITED STEELWORKERS OF AMERICA, ET AL.,
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No. 176

PETITIONER'S REPLY BRIEF UNDER RULE 24(4)

Respondent's Brief in Opposition requires brief reply

I.

In the first place, respondent has gone outside the record in filing, as an appendix to its brief, a purported record of certain alleged proceedings before the Connecticut State Board of Mediation and Arbitration.

The record of those alleged proceedings is not certified.

While petitioner concedes that there was a hearing noticed, for June 30, 1965, petitioner's counsel contended that the matter was *sub judice* and therefore declined to participate in whatever proceedings the Board purported to conduct.

The matter *is sub judice,* in this Court, and petitioner contends that pending the final judicial determination of this cause, the Board lacked competence to proceed *ex parte,* as respondent reports that it did.

Meanwhile, therefore, the case below is not moot, as claimed.

II

By the same token, the purported arbitration award of the Board (set forth in the appendix to respondent's brief) and the findings and conclusions recited therein, are not binding on petitioner and are not properly before this Court.

But even if they were, they show that, at the very least, Mr. Saladak, the discharged employee, "had carried slips into the plant representing 'play' taken at other times . . ." (Respondent's Brief, p. 3).

Of course, this alone is a violation of Connecticut General Statutes (Rev. 1961) § 53-298 (set forth at pp. 4-5 of the Petition) and specifically of the provision, "Any person . . . who . . . keeps, or is the custodian of, any slips . . . used for any such [policy playing] purposes . . . shall be fined . . . or imprisoned . . .".

Whatever he testified before the Board, without fear of cross-examination, the compelling fact is that Saladak had earlier pleaded guilty to the charge in the Connecticut Circuit Court.

Thus, the case is squarely within the judicially-declared public policy of Connecticut (*Avco Corporation* v. *Preteska*, 22 Conn. Supp. 475, 174 A2d 684, Super. Ct., 1961) that any arbitration award directing reinstatement of an employee guilty of violating the gambling laws on the employer's premises (as, here, Saladak violated the gambling laws by admittedly having custody of policy slips in petitioner's plant) is *void*.

III

The one case on which respondent relies, *Local 453* v. *Otis Elevator Co.*, 314 F. 2d 25 (2d Cir. 1963), cert. den. 373 U. S. 949, is not apposite: That case involved a *New York* situation, where the employee had *not* pleaded guilty,

not a *Connecticut* gambling violation where the employee *did* plead guilty; and in New York there was no state court decision (like *Avco* v. *Preteska,* supra, in Connecticut) specifically declaring void as against public policy an arbitration award ordering reinstatement under the instant circumstances.

CONCLUSION

Under the judicially-declared public policy of Connecticut, where, as here, an employee violates the State gambling statutes in the employer's plant, any arbitration award ordering his reinstatement is *void.*

No matter what the public policy of New York is, any award in Connecticut in the premises in Saladak's favor would be void.

The company was entitled to a trial of its action seeking from the district court an injunction against this arbitration.

This Court should grant certiorari to review the judgments below in this important issue of federal labor law where, admittedly (Respondent's Brief, p. 5)

> "[t]here is only one reported decision in which the 'Question' has been considered . . .".

Dated: August 16, 1965.

Respectfully submitted,

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